A

ALLIED PHYSICS SDN BHD v. KETUA AUDIT NEGARA (MALAYSIA) & ANOR AND OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
BALIA YUSOF WAHI FCJ
HAMID SULTAN ABU BACKER JCA
B VERNON ONG LAM KIAT JCA
[CIVIL APPEALS NO: W-01-146-05-2014, W-02-810-05-2014, W-02-811-05-2014, W-02-812-05-2014 & W-02-813-05-2014]
20 OCTOBER 2015

C ***TORT:*** *Defamation – Libel – Auditor General published audit report and synopsis – Audit report and synopsis referred in articles by national newspapers – Allegation that report, synopsis and articles gave imputation that plaintiff had no licence and had committed criminal offence – Whether words complained of capable of bearing defamatory meaning – Whether words complained of defamatory*

D The appellant ('the plaintiff') ran the business of carrying out quality control tests on CT scanners, X-ray machines, and X-ray machine operators. In 2006, the plaintiff was engaged by General Electric International ('GEI') to prepare testing and commissioning reports. GEI subsequently submitted the plaintiff's reports to the Ministry of Health for technical and commercial E compliance. In 2008, the Auditor General published the AG's Report and Synopsis of the AG's Report. The AG's Report was released and distributed to various newspapers in the country. Articles referring to the AG's Report or the Synopsis of the AG's Report were published by the newspapers. The plaintiff commenced claims at the High Court for damages for defamation F against (i) the Auditor General of Malaysia; (ii) The New Straits Times Press (M) Bhd; (iii) Guang Ming Ribao Sdn Bhd; (iv) Berita Harian; and (v) Sin Chew Media Corporation Bhd. According to the plaintiff, the words in the AG's Report and the Synopsis, which were subsequently published by the newspapers, were defamatory of the plaintiff as they imputed that the G plaintiff (i) did not have the requisite licence to verify the quality and safety of PET CT scanner; (ii) had no licence in the related field; (iii) did not have the requisite licence to carry out testing and certification on shielding of the PET CT scanner; (iv) committed a criminal offence by failing to possess the requisite licence; and (v) was dishonest in the way it carried on its business. H The High Court Judge dismissed the plaintiff's claim and held that (i) the impugned publications were not defamatory of the plaintiff; (ii) the defences of justification and qualified privilege applied; and (iii) the defendants were not actuated by malice. Hence, the present appeals. The appeals were consolidated and heard together. The issues highlighted for the court's determination were (i) whether the words complained of were capable of I bearing a defamatory meaning; and if so, (ii) whether the words complained of were in fact defamatory.

Held (dismissing appeals)
Per Vernon Ong Lam Kiat JCA delivering the judgment of the court:

(1) In order to determine whether the impugned words were capable of being defamatory, the AG's Report must be read as a whole and in its full context. The AG's Report was prepared in the performance of the statutory duties of the Auditor General under the Audit Act 1958 and under the powers conferred by arts. 106 and 107 of the Federal Constitution. Furthermore, the AG's Report was in the nature of a public document as the facts contained therein were of public interest and the statements were made by the Auditor General in the course of his official duty. The Auditor General commented that the plaintiff did not have the PET CT scan licence. The Auditor General would be remiss in the discharge of his duties if he omitted to state that fact in his audit report. (paras 33-35)

(2) There was nothing in the AG's Report and the newspaper publications which were capable of bearing a defamatory meaning. The reports pertaining to the AG's Report published in The New Straits Times, Guang Min Ribao Daily, Berita Harian and Sin Chew Daily should also be read within the context and circumstances of the publication. The impugned publications were not defamatory of the plaintiff. (paras 36 & 37)

Bahasa Malaysia *Headnotes*

Plaintif menjalankan perniagaan menguji kawalan mutu mesin pengimbas CT, X-ray dan mesin pengendali X-ray. Pada 2006, plaintif dipertanggungjawabkan oleh General Electric International ('GEI') untuk menyediakan laporan ujian dan pengkomisenan. GEI seterusnya menyerahkan laporan plaintif kepada Kementerian Kesihatan bagi pematuhan teknikal dan komersial. Pada 2008, Ketua Audit Negara menerbitkan Laporan AG dan Sinopsis Laporan AG. Laporan AG diserahkan dan diedarkan kepada pelbagai akhbar dalam negara. Artikel-artikel merujuk pada Laporan AG dan Sinopsisnya diterbitkan oleh akhbar. Plaintif memulakan tuntutan di Mahkamah Tinggi bagi ganti rugi untuk fitnah terhadap (i) Ketua Audit Negara Malaysia; (ii) The New Straits Times Press (M) Bhd; (iii) Guang Ming Ribao Sdn Bhd; (iv) Berita Harian; dan (v) Sin Chew Media Corporation Bhd. Menurut plaintif, perkataan-perkataan dalam Laporan AG dan Sinopsisnya, yang kemudiannya diterbitkan dalam akhbar, memfitnah plaintif kerana mengatakan plaintif (i) tidak mempunyai lesen yang diperlukan untuk mengesahkan kualiti dan keselamatan mesin pengimbas PET CT; (ii) tiada lesen dalam bidang berkenaan; (iii) tidak mempunyai lesen yang diperlukan untuk menjalankan pemeriksaan dan pengesahan pemerisaian mesin pengimbas PET CT; (iv) telah melakukan kesalahan jenayah kerana gagal memiliki lesen yang diperlukan; dan (v) tidak jujur dalam menjalankan perniagaannya. Hakim Mahkamah Tinggi menolak tuntutan plaintif dan memutuskan bahawa (i) terbitan yang dipertikaikan

A tidak memfitnah plaintif; (ii) pembelaan justifikasi dan perlindungan bersyarat terpakai; dan (iii) defendan-defendan tidak terdorong oleh niat jahat. Oleh itu, timbul rayuan-rayuan ini. Kesemua rayuan ini digabungkan dan dibicarakan bersekali. Isu-isu yang diutarakan untuk diputuskan oleh mahkamah adalah (i) sama ada perkataan-perkataan yang diadu berupaya
B mempunyai makna memfitnah; dan jika ya, (ii) sama ada perkataan-perkataan yang diadu sememangnya memfitnah.

Diputuskan (menolak rayuan-rayuan)
Oleh Vernon Ong Lam Kiat HMR menyampaikan penghakiman mahkamah:

C **(1)** Untuk memutuskan sama ada perkataan-perkataan yang dipertikaikan berupaya memfitnah, Laporan AG mesti dibaca sepenuhnya dan dalam konteks penuhnya. Laporan AG disediakan dalam penjalanan tugas statutori Ketua Audit Negara di bawah Akta Audit 1958 dan di bawah kuasa yang diberi di bawah per. 106 dan 107 Perlembagaan Persekutuan. Selanjutnya, Laporan AG adalah dokumen awam kerana fakta-fakta yang
D terkandung dalamnya berkepentingan awam dan kenyataan-kenyataan yang dibuat oleh Ketua Audit Negara dibuat dalam menjalankan tugas rasmi beliau. Ketua Audit Negara menyatakan bahawa plaintif tidak mempunyai lesen mesin pengimbas PET CT. Ketua Auditor Negara akan berlaku cuai dalam menjalankan tugas beliau sekiranya tidak menyatakan
E fakta tersebut dalam laporan audit beliau.

(2) Tiada apa-apa dalam Laporan AG dan terbitan akhbar yang berupaya memberi makna memfitnah. Laporan berkenaan Laporan AG yang diterbitkan dalam The New Straits Times, Guang Min Ribao Daily, Berita Harian dan Sin Chew Daily juga sepatutnya dibaca dalam konteks
F dan hal keadaan penerbitan. Terbitan yang dipertikaikan tidak memfitnah plaintif.

Case(s) referred to:
Abd Rahman Mamat lwn. Zakaria Senik & 5 Lagi [2002] 1 LNS 278 HC ***(refd)***
Ayob Saud v. TS Sambanthamurthi [1989] 1 CLJ 152; [1989] 1 CLJ (Rep) 321 HC
G ***(refd)***
Capital & Countries Bank Limited v. George Henry & Sons (1882) 7 App Cas 741 ***(refd)***
Chok Foo Choo v. The China Press Bhd [1999] 1 CLJ 461 CA ***(refd)***
Drummond-Jackson v. British Medical Association [1970] 1 All ER 1094 ***(refd)***
Gillick v. Brook Advisory Centres & Another [2001] EWCA Civ 1263 ***(refd)***
Jeynes v. News Magazines Ltd and Another [2008] EWCA Civ 130 ***(refd)***
H *Jones v. Skelton [1963] 1 WLR 1362* ***(refd)***
Keluarga Communication Sdn Bhd v. Normala Samsuddin & Another Appeal [2006] 2 CLJ 46 CA ***(refd)***
Kian Lup Construction v. Hongkong Bank Malaysia Bhd [2002] 7 CLJ 32 HC ***(refd)***
Lee Kuan Yew v. JB Jeyaratnam [1978] 1 LNS 93 HC ***(refd)***
I *Lewis v. Daily Telegraph Ltd [1963] 2 All ER 151* ***(refd)***
Morgan v. Odhams Press Ltd [1971] 2 All ER 1156 ***(refd)***
Neville v. Fine Arts Co [1897] AC 68 ***(refd)***
Ratus Mesra Sdn Bhd v. Shaik Osman Majid & Ors [1999] 8 CLJ 499 HC ***(refd)***
The Institute of Commercial Management United Kingdom v. New Straits Times Press (Malaysia) Bhd [1993] 2 CLJ 365 HC ***(refd)***

Legislation referred to:
Atomic Energy Licensing Act 1984, ss. 13(2), 40
Audit Act 1957, ss. 5, 6(d), 7, 9
Federal Constitution, arts. 106, 107
Radiation Protection (Licensing) Regulations 1986, reg. 12

Other source(s) referred to:
Gatley on Libel and Slander, 10th edn, para 30.6
Gatley on Libel and Slander, 12th edn, p 7

(Civil Appeal No: W-01-146-05-2014)
For the appellant - T Sudhar, Edward Kuruvilla & Lim Zi-Han; M/s Shook Lin & Bok
For the respondents - Zureen Ellina Md Dom, SFC & Nurul Ainy Yahya, FC

(Civil Appeals No: W-02-810-05-2014 & W-02-812-05-2014)
For the appellant - T Sudhar, Edward Kuruvilla & Lim Zi-Han; M/s Shook Lin & Bok
For the respondent - Harjinder Kaur & Farhan Ghani; M/s Shahrizat Rashid & Lee

(Civil Appeals No: W-02-811-05-2014 & W-02-813-05-2014)
For the appellant - T Sudhar, Edward Kuruvilla & Lim Zi-Han; M/s Shook Lin & Bok
For the respondent - Yiew Voon Lee; M/s CH Yeoh & Yiew

[Editor's note: Appeal from High Court, Kuala Lumpur; Suits No: S-21-57-2009, S-23-14-2009, S-23-15-2009, S-23-16-2009 & S-23-17-2009 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Vernon Ong Lam Kiat JCA:

Introduction

[1] The five appeals herein relate to a decision of the High Court given on 31 January 2014 after a full trial dismissing the plaintiff's claims for damages for defamation against the Auditor General of Malaysia (Appeal No. 146), The New Straits Times Press (Malaysia) Bhd (Appeal No. 810), Guang Ming Ribao Sdn Bhd (Appeal No. 811), Berita Harian (Appeal 812) and Sin Chew Media Corporation Bhd (Appeal No. 813).

[2] On 20 June 2014, the Court of Appeal ordered that the five appeals to be consolidated and heard together. In this judgment the parties shall be referred to as they were in the court below.

The Salient Facts

[3] The plaintiff is in the business of carrying out quality control (QC) tests on X-ray machines, CT scanners and X-ray machine operators.

[4] The plaintiff was at the material time the holder of a Class H licence and is registered with the Atomic Energy Licensing Board (AELB) to carry out, amongst other things, quality checks, certification, testing and commissioning of ionising radiation equipment and its facilities as required by the Atomic Energy Licensing Act 1984.

[5] In 2006, the plaintiff was engaged by General Electric International to prepare the following reports:

(i) report on testing and commissioning general electric PET-CT scanner at Putrajaya Hospital;

(ii) QC testing and commissioning for computed tomography at Putrajaya Hospital;

(iii) performance testing and commissioning of one unit of general rlectric PETrace cyclotron at Putrajaya Hospital; and

(iv) report on testing & commissioning general electric PET-CT scanner at Pulau Pinang Hospital.

[6] The aforesaid testing and commissioning reports were subsequently submitted by the plaintiff's clients to the Ministry of Health ("MOH") for technical compliance and commercial compliance.

[7] On or about 29 August 2008, the Auditor General published the following documents:

(i) report prepared in the National Language entitled "Laporan Ketua Audit Negara Tahun 2007 – Aktiviti Kementerian/Jabatan dan Pengurusan Syarikat Kerajaan Persekutuan" ("the AG's Report");

(ii) synopsis of the AG's Report prepared in the English language entitled "Auditor General's Report 2007 – Synopsis Auditor General's Report on the Activities of Federal Government Ministries/Departments 2007" ("Synopsis of AG's Report").

[8] On or about 29 August 2008, the Auditor General released and distributed the AG's Report to various newspapers in the country. A press release was posted by the Auditor General on the official website of National Audit Department.

[9] Newspaper articles referring to the AG's Report or the Synopsis of the AG's Report were published to members of the public by The New Straits Times, Guan Ming Ribao Daily, Berita Harian and Sin Chew Daily.

[10] The publications complained of concerning the plaintiff are set out below. The impugned words in question are:

> Appeal No. 146 – Auditor General of Malaysia
>
> [at page xxxii of the AG's Report]
>
> Selain itu, syarikat yang dilantik oleh kontraktor untuk membuat pengesahan terhadap kualiti dan keselamatan PET CT Scan tidak mempunyai lesen di bawah bidang berkaitan mengikut kehendak Seksyen 13(2) Akta Pelesenan Tenaga Atom (Akta 304).

[English translation]

Besides this, the company appointed by the contractor to verify the quality and safety of PET CT Scan has no licence in the related field according to Section 13(2) of the Atomic Energy Licence Act (Act 304).

[at page 478 of the AG's Report]

20.4.6.4. Seksyen 13(2) Akta Perlesenan Tenaga Atom (Akta 304) menetapkan hanya orang yang berkelayakan dan yang mempunyai lesen sahaja boleh menggunakan bahan radioaktif, nuclear atau radas penyinaran. Semakan Audit mendapati Syarikat Allied Physics Sdn Bhd yang dilantik oleh pihak kontraktor untuk membuat pengesahan terhadap kualiti dan keselamatan PET CT Scan tidak mempunyai lesen di bawah bidang berkaitan. Pada pandangan Audit, selaras dengan Seksyen 13(2) Akta 304, perakuan pengesahan terhadap kualiti dan keselamatan PET CT Scan yang dibuat oleh Syarikat Allied Physics Sdn Bhd boleh dipertikaikan. Oleh itu, Kementerian sepatutnya mengarahkan kontraktor melantik syarikat yang berkelayakan untuk membuat perakuan tersebut.

[English translation]

20.4.6.4. Section 13(2) of the Atomic Energy Licensing Act (Act 304) provides that only persons and qualified and licensed are entitled to handle radioactive material, nuclear material or irradiating apparatus. The Auditor's investigation reveals that Allied Physics Sdn Bhd which was appointed by the contractor to verify the quality and safety of the PET CT Scan has no licence in the related field. In the Auditor's opinion, in line with s 13(2) of Act 304, the validity of the certification of quality and safety of the PET CT Scan by Allied Physics Sdn Bhd is questionable. Therefore, the Ministry of Health should direct that the contractor appoint a company which is qualified to carry out the said certification.

[at page 24 of the Synopsis of the AG's Report]

Selain itu, syarikat yang dilantik oleh kontraktor untuk membuat pengesahan terhadap kualiti dan keselamatan PET CT Scan tidak mempunyai lesen di bawah bidang berkaitan mengikut kehendak Seksyen 13(2) Akta Perlesenan Tenaga Atom (Akta 304).

[English translation]

Besides this, the company appointed by the contractor to verify the quality and safety of PET CT Scan has no licence in the related field according to Section 13(2) of the Atomic Energy Licensing Act (Act 304).

Appeal No. 810 - The New Straits Times

In addition, Syarikat Allied Physics Sdn Bhd, the company subcontractor by Glotel to certify the quality and safety of the PET CT Scan, was not qualified or licensed to handle radioactive material and X-ray equipment, as required under Section 13(2) of the Atomic Energy Licensing Act.

The Report said that Globel's sub-contractor, Syarikat Allied Physics Sdn Bhd., was also not qualified or licensed to handle radioactive material and X-ray equipment.

Appeal No. 811 – Guang Min Ribao Daily

[English translation]

Tan Sri Dato' Ambrin stated that, as Allied Physics Sdn Bhd, the sub-contractor appointed by Glotel Sdn Bhd did not possess a licence to verify the safety and quality of the equipment, it was not qualified to verify the safety and quality of the said equipment.

Appeal No. 812 – Berita Harian

Syarikat Allied Physics Sdn Bhd, subkontraktor dilantik Globel bagi mengiktiraf kualiti dan keselamatan PET CT Scan itu tidak berkelayakan atau memiliki lesen mengendalikan bahan radioaktif dan pengimejan seperti di bawah Seksyen 13(2) Akta Perlesenan Tenaga Atom.

[English translation]

Allied Physics Sdn Bhd, the subcontractor appointed by Glotel to certify the quality and safety of the PET CT Scan, was not qualified or licensed to handle radioactive material and imaging equipment as required under Section 13(2) Atomic Licensing Act.

Appeal No. 813 – Sin Chew Daily

[English translation]

Tan Sri Dato' Ambrin said, Allied Physics Sdn Bhd, the sub-contractor appointed by Globel Sdn Bhd was not qualified to verify the quality and safety of the equipment because the said company did not possess the necessary licence to do so.

Findings Of The High Court

[11] In her oral judgment given on 31 March 2014, the learned judge dismissed the plaintiff's claim on three main grounds:

(i) the impugned publications were not defamatory of the plaintiff;

(ii) the defences of justification and qualified privilege applied; and

(iii) the defendants were not actuated by malice.

Submission Of Parties

[12] The first issue relates to the question of whether the impugned words in the publications are capable of bearing a defamatory meaning and are in fact defamatory. Learned counsel for the plaintiff submitted that the words in the AG's Report and the synopsis of the AG's Report were defamatory of the plaintiff as they imputed that:

(a) the plaintiff did not have the requisite licence to verify the quality and safety of PET-CT scanner;

(b) the plaintiff had no licence in the related field;

(c) the plaintiff did not have the requisite licence to carry out testing and certification on shielding of the PET-CT scanner;

(d) the plaintiff had committed a criminal offence by failing to possess the requisite licence; and

(e) the plaintiff was dishonest in the way it carried on its business.

[13] First, learned counsel for the plaintiff submitted that DW1 (Penolong Pengarah Jabatan Audit Negara, Cawangan Audit Kesihatan) and DW2 (Ketua Penolong Pengarah Kanan Seksyen Keselamatan Sinaran) confirmed that the AG's Report imputed that the plaintiff did not hold a licence to conduct certification of both the PET-CT scanner and X-ray equipment. Further, the literal interpretation of the impugned words is that the plaintiff was not qualified to verify the quality and safety of the PET-CT scanner and X-ray equipment (*Drummond-Jackson v. British Medical Association* [1970] 1 All ER 1094 (CA), 1104).

[14] Second, it was argued that the impugned words imputed that the plaintiff did not have the licence to conduct safety certification on the PET-CT scanner. DW2 acknowledged that the word 'safety' in the AG's impugned words refers also to the certification of the building shielding the PET-CT scanner.

[15] Thirdly, learned counsel argued that by imputing that the plaintiff required a licence under s. 13(2) of Act 304 to conduct testing on PET-CT scanner and X-ray equipment and did not possess such licence when testing was conducted, the plaintiff was imputed to have committed an offence under s. 40 of Act 304 or had conducted its business in a dishonest and/or misleading manner.

[16] As against The New Straits Times, Guan Ming Ribao Daily, Berita Harian and Sin Chew Daily, learned counsel for the plaintiff argued that the impugned words in the respective newspaper publications inferred or imputed that:

(a) the plaintiff required a specific licence to carry out certification and testing of PET-CT scanners;

(b) the plaintiff did not have the necessary licence to handle X-ray machinery;

(c) the plaintiff was not qualified to carry out testing on PET-CT scanners and X-ray machinery;

(d) the plaintiff committed a criminal offence;

(e) the plaintiff had carried out its business in a dishonest manner; and

(f) the plaintiff did not possess a licence to certify X-ray equipment.

[17] Learned counsel for the plaintiff also submitted that the Class H licence was issued to Dr Ng Kwan Hoon and not to the plaintiff (reg. 12 of the Radiation Protection (Licensing) Regulations 1986; s. 40 Act 304). DW2 also confirmed that the impugned statements made by the Auditor General

were false and untrue. DW2 said that there was no specific licence for PET-CT scanners at that time because it was new. As such, the current holders of Class H licence were permitted to conduct testing and certification of PET-CT scanner. DW2 also agreed that the PET component of the PET-CT scanner falls within the category of "kemudahan-kemudahan berkaitan" within the express scope of the Class H licence.

[18] After hearing of learned counsel's submission on the issue of whether the impugned words in the publications are capable of bearing a defamatory meaning and are in fact defamatory, we indicated to the parties that we would like to hear the defendants' submission in reply to this threshold issue before proceeding with the remaining issues.

[19] Learned Senior Federal Counsel (SFC) for the Auditor General submitted that the plaintiff's contention is that the impugned words meant that the plaintiff has no licence or is not qualified under s. 13(2) of the Act 304 to do certification of the quality and safety of PET-CT scanner. This point is true because DW1 and DW9 said that the plaintiff did not have a licence for PET-CT scanner. DW5 explained that there are differences between a PET-CT scanner and a CT scanner and that the Class H licence only refers to CT scanner and not PET-CT scanner.

[20] Further, learned SFC argued that the impugned words should not be read in isolation but the statements should be read as a whole and in its full context (*The Institute of Commercial Management United Kingdom v. The New Straits Times Press (Malaysia) Bhd* [1993] 2 CLJ 365; *Abd Rahman Mamat lwn. Zakaria bin Senik & 5 Lagi* [2002] 1 LNS 278; [2002] 7 MLJ 34). There is no suggestion that the plaintiff committed any criminal offence. Those statements were made for auditing purposes and improvisation of activities in the AG's Report *in lieu* of the Ministry of Health.

[21] Learned SFC also submitted that publication of the AG's Report and the synopsis of the AG's Report must be considered in the light of the fact that (i) the powers given to the Auditor General is enshrined under arts. 106 and 107 of the Federal Constitution and the Audit Act 1957. Section 5 of the Audit Act 1957 sets out the duties of the Auditor General to inspect, investigate and to audit; s. 6 provides that the Auditor General shall in his audit make such examination as he may deem necessary to ascertain, among others, whether in his opinion funds have been applied to the purposes for which they were appropriated or authorised and the activities related to such purposes were carried out or managed in an efficient manner (s. 6(d)). In this connection, the Auditor General is authorised to exercise the various powers enumerated under s. 7 of the Audit Act 1957. After the inspection, investigation and audit have been completed, the Auditor General will prepare a report known as the Auditor General's Report to be submitted to the Yang di-Pertuan Agong and laid before the Dewan Rakyat in accordance with s. 9 of the Audit Act 1957.

[22] Lastly, learned SFC submitted that the test to be applied when considering whether a statement is defamatory of a plaintiff is an objective one in that it must be given a meaning in which a reasonable man would understand it (*Ratus Mesra Sdn Bhd v. Shaik Osman Majid & Ors* [1999] 8 CLJ 499). Therefore, a reasonable man in the society reading the statements would not see it as defamatory considering the circumstances and context as to the reason for its publication. A reasonable man would understand that the purpose and intention of the AG's Report is meant for public interest and for the country. In no way can it be argued that it is published to tarnish the reputation of any party. PW2, the plaintiff's director admitted that the purpose of the AG's Report is to present the results and opinion of the audit, to point out any weakness and to improve the performance of the department.

[23] In reply, learned counsel for The New Straits Times and the Berita Harian submitted that the threshold issue should be determined by considering whether the words complained of in their natural and ordinary meaning are defamatory of the plaintiff. The test is whether under the circumstances in which the writing was published, a reasonable man to whom the publication was made, would be likely to understand it in a libellous sense. The test of reasonableness guides and directs the court in its function of deciding whether it is open to the jury in any particular case to hold that reasonable persons would understand the words complained of in a defamatory sense (*Ayob bin Saud v. TS Sambanthamurthi* [1989] 1 CLJ 152; [1989] 1 CLJ (Rep) 321; [1989] 1 MLJ 315). It is an undeniable fact that the Class H licence did not cover PET CT Scanners and that the plaintiff did not have a licence for certifying and testing PET-CT scanners. As such, learned counsel argued that the statements were not capable of being defamatory of the plaintiff.

[24] On behalf of Guan Ming Ribao Daily and Sin Chew Daily, learned counsel submitted that in order to determine the threshold issue the court should ascertain whether the impugned words are capable of bearing a defamatory meaning. If so, the next step is for the court to determine whether the impugned words are in fact defamatory (*Chok Foo Choo v. The China Press Bhd* [1999] 1 CLJ 461 (CA)). In this instance, the plaintiff is relying on s. 40 of the Act 304 to argue that it is an offence to practice without a licence and that the plaintiff is consequently conducting its business dishonestly. Learned counsel submitted that these are special facts which an ordinary reader would not know of. The impugned words read as a whole was referring to the lack of the requisite licence to certify the quality and safety of PET-CT scanners only. There was no reference to any provision of the law which made it an offence to practise without a licence and there was no imputation that the plaintiff has contravened the law, has committed an offence or has carried on or is carrying on its business in a dishonest, misleading or deceptive manner by falsely representing to its customers that

it is licensed and legally qualified to handle irradiating apparatus or related facilities as alleged by the plaintiff. No witnesses were called by the plaintiff to testify that they have understood the impugned words as having the meaning inferred by the plaintiff in its pleading which would certainly require the support of extrinsic facts passing beyond general knowledge which was not the plaintiff's pleaded case.

Threshold Issue

Whether The Words Complained Of Are Capable Of Bearing A Defamatory Meaning? If So, Whether The Words Complained Of Are In Fact Defamatory

[25] In the first place the burden of proof is on the plaintiff to show that (i) the impugned words are defamatory; (ii) the impugned words refer to the plaintiff; and (iii) the impugned words were published (*Morgan v. Odhams Press Ltd* [1971] 2 All ER 1156, 1179; *Ayob bin Saud v. TS Sambanthamurthi* [1989] 1 CLJ 152; [1989] 1 CLJ (Rep) 321; [1989] 1 MLJ 315, 323; *Kian Lup Construction v. Hongkong Bank Malaysia Bhd* [2002] 7 CLJ 32; [2002] 7 MLJ 283, 284).

[26] In this instance it is not really disputed that the impugned words in question refer to the plaintiff and that they were published. Accordingly, we will consider the question of whether the impugned words are defamatory.

[27] In this process, the first step is for the court to determine whether the words complained of are capable of bearing a defamatory meaning.

[28] As a starting point, it is also instructive to refer to the three formulae set out in *Gatley on Libel and Slander* (12th edn) at p. 7 as follows:

(i) would the imputation tend to lower the plaintiff in the estimation of right-thinking members of society generally?;

(ii) would the imputation tend to cause others to shun or avoid the claimant?; and

(iii) would the words tend to expose the claimant to "hatred, contempt or ridicule"?

[29] This is in essence a question of law that turns upon the construction of the words published (*Ayob bin Saud (supra)* at p. 317; *Chok Foo Choo (supra)* at pp. 466 and 467). The test according to the authorities is an objective test and it is whether, under the circumstances in which the words were published, reasonable men to whom the publication was made, would be likely to understand it in a defamatory or libellous sense (see *Jones v. Skelton* [1963] 1 WLR 1362; *Capital & Countries Bank Limited v. George Henry & Sons* (1882) 7 App Cas 741; *Lee Kuan Yew v. JB Jeyaratnam* [1978] 1 LNS 93; [1979] 1 MLJ 281).

[30] In this regard, the legal principles relevant to meaning have been summarised by the English Court of Appeal in *Jeynes v. News Magazines Ltd and Another* [2008] EWCA Civ 130 (CA) as follows:

(a) The governing principle is reasonableness.

(b) The hypothetical reasonable reader is not naive but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available.

(c) Over-elaborate analysis is best avoided.

(d) The intention of the publisher is irrelevant.

(e) The article must be read as a whole, and any "bane and antidote" taken together.

(f) The hypothetical reader is taken to be representative of those who would read the publication in question.

(g) In delimiting the range of permissible meanings, the court should rule out any meaning which, "can only emerge as the produce of some strained, or forced, or utterly unreasonable interpretation …" (see Eady J in *Gillick v. Brook Advisory Centres & Another* approved by this court [2001] EWCA Civ 1263 at para. 7 and *Gatley on Libel and Slander* (10th edn), para. 30.6).

(h) It follows that "it is not enough to say that by some person or another the words might be understood in a defamatory sense." *Neville v. Fine Arts Co* [1897] AC 68, 61 JP 500, 66 LLQB 195 per Lord Halsbury LC at 73.

[31] Accordingly, the words are to be taken in the sense that it is most natural and obvious. The ordinary and natural meaning of words may be either the literal meaning or it may be implied or inferred or an indirect meaning: any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning capable of being detected in the language used can be part of the ordinary and natural meaning of words (see *Lewis v. Daily Telegraph Ltd* [1963] 2 All ER 151). The ordinary and natural meaning may therefore include any implication or inference which a reasonable reader guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction would draw from the words.

[32] It is equally important to note that the context and circumstances of the publication must be taken into consideration, not only the actual words used (*Keluarga Communication Sdn Bhd v. Normala Samsuddin & Another Appeal* [2006] 2 CLJ 46; [2006] 2 MLJ 700 (CA) at 708).

[33] In order to determine whether the impugned words are capable of being defamatory, the AG's Report must be read as a whole and in its full context. In this respect, the court should have regard to the fact that the AG's Report was prepared in the performance of the statutory duties of the Auditor General under the Audit Act 1957 and under the powers conferred by arts. 106 and 107 of the Federal Constitution. Further, the AG's Report is in the nature of a public document as the facts contained therein are of public interest and the statements are made by the Auditor General in the course of his official duty.

[34] In this regard, it is also important to read the continuation of the text (set out below) where the Auditor General made the comment on the fact that the plaintiff did not have the PET-CT scan licence.

> Semakan Audit mendapati Syarikat Allied Physics Sdn Bhd yang dilantik oleh pihak kontraktor untuk membuat pengesahan terhadap kualiti dan keselematan PET CT Scan tidak mempunyai lesen di bawah bidang berkaitan. Pada pandangan Audit, selaras dengan Seksyen 13(2) Akta 304, perakuan pengesahan terhadap kualiti dan keselamatan PET CT Scan yang dibuat oleh Syarikat Allied Physics Sdn Bhd boleh dipertikaikan.

[35] We agree with the submission of learned SFC that the keyword from the above extraction is that the certificate of authentication of the quality and safety of the PET-CT scan produced by the plaintiff is questionable ("boleh dipertikaikan"). The opinion of the Auditor General is premised on the finding that the plaintiff did not have the requisite licence to certify the quality and safety of PET-CT scans. With respect, in the light of the aforesaid finding, the Auditor General would be remiss in the discharge of his duties if the Auditor General had omitted to state that fact in his audit report.

[36] Similarly, the reports pertaining to the AG's Report published in The New Straits Times, Guang Min Ribao Daily, Berita Harian and Sin Chew Daily should also be read within the context and circumstances of the publication. In our respectful view, there is nothing in the AG's Report and the newspaper publications which are capable of bearing a defamatory meaning.

[37] For the foregoing reasons, we agree with the learned judge that the impugned publications are not defamatory of the plaintiff. Accordingly, the five appeals were dismissed with costs.